No. 16222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT, husband and wife,

Appellants,

vs.

IRA B. JORALEMON,

Appellee.

BRIEF OF APPELLEE.

BOYLE, BILBY, THOMPSON & SHOENHAIR,
Ninth Floor Valley National Building,
Tucson, Arizona,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLEE.

To simplify our brief, we will refer to the parties as they appeared in the court below, the appellee Joralemon being the plaintiff and appellants Albert and his wife being the defendants.

Statement of the Case.

Plaintiff does not take the position that defendants' statement of the case is incorrect. He does believe, however, that facts material to his side of the case have been omitted and that in order to give the Court the proper picture such additional facts should be stated. They are as follows:

Plaintiff and defendants were very good personal friends, having been acquainted for almost fifty years. [Tr. 167, 212.] Their dealings were on somewhat of an informal basis. This is evidenced by the fact that Jorale-

mon's letters to Albert are directed to him by his first name and greetings are extended to his wife. [Pltf. Ex. 4, Tr. 134; Pltf. Ex. 5, 138.]

The mining claims covered by the lease and option are located in a barren desert area, remote from any sizable town or city. Possession of the claims would be of no value whatever except to prospect them for minerals. (The Court could take judicial notice of this fact. 20 Am. Jur. 174, Par. 50.)

When plaintiff surrendered the lease and option, by his letter of November 5, 1956 [Pltf. Ex. 4, Tr. 134], he made it clear to defendants that after investigation he had concluded, to his own satisfaction, that there was no valuable mineral in the claims. This he again repeated in his letter of November 16, 1956 [Pltf. Ex. 5, Tr. 138], by which he sent to Albert the logs of the drilling he had done on the claims and in which he states: "I can see no chance that it contains workable ore. * * * I am sorry that we did not succeed in finding ore. We tried hard." Immediately after sending Albert the letter of November 5, 1956, plaintiff vacated the mining claims and never returned to them. [Tr. 135.] Defendants knew that plaintiff was leaving the property and thought that he intended to. [Tr. 208.]

At no time after receiving plaintiff's letter of November 5, 1956, until April 16, 1957, did defendants, or anyone on their behalf, ever say or indicate to plaintiff that delivery of a quitclaim deed and payment in full of all defendants claimed to be due were conditions that must be fulfilled before the lease and option could be considered terminated, although conversations and correspondence were had between the parties between said dates. [Tr. 147-149, 206, 211-212, 215.] In fact, the defendant Al-

bert informed his attorney that he did not want to demand a quitclaim deed. [Tr. 211.]

There is nothing in the evidence to indicate that plaintiff or his agents were not acting in good faith in disputing the amount claimed to be due out of the quarterly payment maturing November 8, 1956. Defendants' counsel concedes that there is no issue of good faith on the part of plaintiff. [Tr. 132.]

Had plaintiff known that it was or was going to be de-defendants' position that the lease and option could not be terminated until the controversy over the amount due had been settled and the quitclaim deed supplied, he would have promptly supplied the deed and taken such steps as were necessary to settle the controversy. [Tr. 148-149.]

ARGUMENT.

Defendants' appeal is based upon only two Specifications of Error. They are that the trial court erred in making its Finding of Fact No. VII [Tr. 57] and Conclusion of Law No. V [Tr. 61], for the reasons—first that there was no evidence to support such finding or conclusion, and second because there was no allegation of waiver in the pleadings. We will discuss these two propositions in the reverse order in which defendants have discussed them.

The Pleadings and Other Proceedings in the Case Are Sufficient to Sustain the Affirmative Defense of Waiver and Estoppel.

It is our position that the plaintiff's complaint does plead facts sufficient upon which to base the defense of waiver. [See paragraphs 8 and 9 of plaintiff's complaint, Tr. 7-8.] Those paragraphs set forth the acts of the defendants upon which the plaintiff relied to establish waiver and estoppel on the part of defendants. Furthermore, in the

opening statement of counsel for plaintiff it is stated [Tr. 96] that plaintiff would prove facts upon which to base a waiver and estoppel. In addition to the pleadings and statement of counsel, evidence was introduced throughout the trial to establish the existence of a waiver and an estoppel, and no objection was offered to such evidence upon the ground that there were no pleadings to support it and that waiver and estoppel were not an issue in the case. Particular attention is called to the statement of one of counsel for plaintiff [Tr. 148] in discussing certain testimony that was offered. It is there said: "We have a question of waiver and estoppel in connection with this. I think we have a right to prove that Mr. Joralemon stood ready, willing and able to furnish anything that was requested at any time and that he would have done so had it been requested.", and again [Tr. 167] where counsel for plaintiff said: "There is a question of estoppel here and a question of whether Mr. Joralemon was entitled to reply upon Mr. Albert's failure to make a demand." in neither of these instances, nor at any time during the trial, did counsel for defendants object to such evidence on the ground that there was no proper pleading to support it.

It is not necessary that the defense of waiver or estoppel be pleaded by name. If the facts set forth in the pleadings show a waiver or an estoppel, that is sufficient.

See: *Munger v. Boardman,* 53 Ariz. 271, 88 P. 2d 536. The *Munger* case was later referred to by the Supreme Court of Arizona in the case of *Brown v. Beck,* 64 Ariz. 299, 169 P. 2d 855, where the court says:

> "But even assuming that the general rule is that a defense of this nature should be specifically pleaded, this court in the very recent case of Munger vs. Boardman (53 Ariz. 271), 88 P. (2d) 536, decided

> March 27, 1939, but not yet reported (in State report), has held, in effect, that wherever there is any evidence appearing in the record upon which the special defense of estoppel might have been predicated and urged at the trial, this court may itself raise, consider and apply such defense, notwithstanding that it had neither been pleaded nor urged as an issue by either party in the lower court. If this be true, much more does it follow that a defense which appears in the evidence and has been urged in the trial court is permissible, even though it may not have been pleaded."

The same rule has been adopted by most of the other states. A good example is the case of *Dillard v. Caesar,* 243 P. 2d 356 (Okla.), where the Supreme Court of Oklahoma says:

> "It is not essential that waiver be specifically pleaded since the facts to show it were pleaded."

The same rule has been approved by this Court on a number of occasions. In the case of *James v. Nelson,* 90 F. 2d 910, this Court says:

> "The foregoing, we think, is a sufficient pleading of estoppel in Pais. 'An estoppel arises as a conclusion of law from the facts pleaded, rather than from the mere designation of the act as an estoppel.' "

Furthermore, even though there were no pleadings upon which to base the defense, under the provisions of Rule 15(b) of Federal Rules of Civil Procedure it is provided that if there is evidence bearing upon an issue offered and received in the case without objection, upon the ground that there was no sufficient pleading, and if the matter is

thus litigated, it is not material that there were no pleadings upon which to base it. The above rule provides:

> *"Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, *but failure so to amend does not affect the result of the trial of these issues.* If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." (Emphasis ours.)

Not only was the matter litigated, but in the opening statement of counsel for plaintiff it was called to the attention of the court and opposing counsel that the question of waiver and estoppel was in the case. This of itself would be sufficient to properly raise the question.

See:

Gipps Brewing Corp. v. Central Manufacturers' Mutual Insurance Co., 147 F. 2d 6.

Vernon Lumber Corp. v. Harcen Construction, 155 F. 2d 348.

It is apparent, therefore, that the pleadings and proceedings in the trial court were ample to support the defense of both waiver and estoppel.

The Evidence Was Sufficient to Sustain the Court's Finding and Conclusion Establishing Waiver.

Rule 52(a) Federal Rules of Civil Procedure provides that in actions tried to the court without a jury, or where a jury verdict is advisory only, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. * * * " There was ample evidence of an intent in the part of the defendants to waive the provisions of the contract requiring payment of all sums due from plaintiff to defendants and the tender of a quitclaim deed before termination of the contract. To begin with, the plaintiff called attention to the defendant, Greenway Albert, in plaintiff's letter of November 5, 1956, that no quitclaim deed was included with plaintiff's notice of termination. No objection was raised by Albert to this omission, and a few days later when he asked plaintiff to give him the logs of the drilling that had been done on the mining claims he did complain about the amount that had been paid by the plaintiff but made no complaint whatsoever of plaintiff's failure to submit the quitclaim deed. Negotiations and correspondence were carried on for several weeks in arriving at the amount due and ultimately paid defendants by plaintiff, but in none of such negotiations or correspondence did the defendants, or their agents, ever raise any question or complaint about plaintiff's failure to deliver a quitclaim deed, nor did they at any time, until the letter of defendant's counsel, dated April 16, 1957, was written, ever indicate that they were taking, or were going to take, the position that the lease and option had not been terminated. That Albert had thoroughly in mind the fact that he had the right to demand a quitclaim deed can not be doubted. Some time about November, 12, 1956, [Tr. 209], shortly after receipt

of plaintiff's letter of termination, Albert discussed with his attorney the right to demand a quitclaim deed, and was informed by his attorney that he had the right to demand it. Instead of demanding it, he informed his counsel that he did not want to demand a deed. Clearly this statement alone is sufficient evidence upon which the court could find that the defendants had waived their right to demand the deed. It was obvious to the trial court that defendants had no need for the deed. The lease and option had never been recorded. [See Pltf.'s Ex. 3—Tr. 116-130].

Immediately upon writing defendants that he was surrendering the property plaintiff vacated it and never went back to it. Therefore, at all times thereafter the defendants not only had possession but had a clear title to the property, and a quitclaim deed would have been of no use whatever to them. With these conditions existing, it is difficult to see how the court could have failed to find that defendants intentionally waived their right to demand something which would have been useless to them.

We can not agree with the argument of counsel for defendants to the effect that under the law of Arizona waiver must be based upon a consideration. There is some language to that effect in the case of *Davis v. Standard Accident Insurance Company,* 35 Ariz. 392, 278 Pac. 384, cited by defendant. However, that does not seem to be the law as applied in subsequent cases in the Supreme Court of Arizona. In the case of *Waugh v. Lennard,* 69

Ariz. 214, 211 P. 2d 806, the Supreme Court of Arizona says:

> "Waiver is defined as a voluntary and intentional relinquishment of a known right, Home Owners' Loan Corp. v. Bank of Arizona, 54 Ariz. 146, 94 P. (2d) 437."

Other Arizona cases where the doctrine of waiver has been applied without consideration are:

Lee v. Nichols, 81 Ariz. 106, 301 P. 2d 1022;

Onekama Realty Co. v. Carothers, 59 Ariz. 416, 129 P. 2d 918;

Pima Farms Co. v. Fowler, 32 Ariz. 331, 258 Pac. 256;

Stark v. Norton, 24 Ariz. 454, 211 Pac. 66.

In the *Onekama* case, *supra,* the Court, in discussing the doctrine of waiver resulting from the conduct of a party, stated:

> "The rule above stated is obviously based on the equitable principle that when one has lulled another into security by his conduct he cannot take advantage of such conduct until he has given an opportunity to the deceived party to restore the status quo * * * ."

Certainly in the instant case there is evidence from which the trial Court was justified in finding that the defendants knew their rights and intentionally relinquished them, and further that plaintiff was, by defendants' conduct, lulled into a sense of security and was not afforded any opportunity to restore the *status quo.* Once the waiver had been accomplished and the time had passed for the

accrual of a further quarterly payment (February 8, 1957), it was impossible for the original *status quo* to be restored. Under these circumstances the trial court properly found a waiver had taken place.

We believe, therefore, that both the pleadings and the evidence were sufficient to justify the trial court in its finding and conclusions with respect to waiver and that the judgment should, therefore, be affirmed.

Additional Reasons for Sustaining the Judgment of the Lower Court.

If this Court should reach the conclusion that the judgment can not be affirmed on the ground of waiver, there is ample evidence in the record to support an affirmance of the judgment on other grounds.

It seems to be well settled law that if there is any ground on which the lower court may be sustained the judgment must be affirmed although the ground or reason assigned for the action of the trial court may not be sustainable. If the result is correct, the judgment should be sustained if there is any ground upon which the appellate court can do so. In 5*B C. J. S., Appeal and Error, Section* 1849, page 287, it is stated.

> "Where there is any ground on which the action of the lower court may be sustained, the judgment may or must be affirmed although the ground or reason assigned for the action of the court may not be sustainable. A ruling or judgment of the lower court which is not based on any specific ground will not be reversed if it can be supported on any ground."

This rule has been followed, and the particular text above quoted has been cited with approval by this Court in an opinion written by Judge Mathews in the case of *L. McBrine Co. v. Silverman,* 121 F. 2d 181, wherein it was said:

> "We affirm the dismissals; not, however, on the ground assigned by the trial court, but on the ground that no infringement was shown. That we may affirm on a ground not assigned by the trial court is well settled. (Collier v. Stanbrough, 6 How. 14, 21, 12 L. Ed. 324; Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 210, 41 S. Ct. 451, 65 L. Ed. 892, 3 Am. Jur., Appeal and Error §1163, p. 674; 5 C. J. S., Appeal and Error, §1849, pp. 1334, 1335."

In view of this rule, we feel we are justified in pointing out to this Court other grounds upon which the judgment of the lower court should be sustained.

The trial court found that the failure to deliver the quitclaim deed promptly after November 5, 1956, was occasioned by an oversight of John W. Hamilton, Secretary of Homestake Mining Company, or some other officer or agent of that company. We believe that the principal reason why the quitclaim deed was not delivered was because defendants by their conduct had done everything to induce the plaintiff and his agents and representatives to believe that no deed was or would be required. Under such circumstances we think the court should clearly have applied the doctrine of equitable estoppel.

Had the lease remained effective, no rentals would have accrued between November 8, 1956, and February 8, 1957,

at which latter date $7,000.00 would have become due; on May 8, 1957, another $7,000.00 would have become due. [Pltf. Ex. 3, Tr. 116, 122]. In view of this payment schedule, certain dates and events are significant:

November 5, 1956	Plaintiff sent his notice of termination.
November 12, 1956	Defendant, after receiving plaintiff's letter, consulted his attorney regarding it and told him he did not want to demand any quitclaim deed.
November 16, 1956	Defendant called plaintiff, having discussed the matter with his attorney, and discussed plaintiff's letter and, knowing that plaintiff intended by the letter to terminate the lease and to move out of the property, asked plaintiff for the drill logs, but made no mention whatever of any deed and made no mention whatever of any intention to hold plaintiff to the lease until payment of the exact amount due and delivery of the deed.
April 16, 1957	The defendant, over five months after plaintiff's attempted termination, had his attorney send the letter which is Plaintiff's Exhibit 7, which letter was the first outward indication from the defendant that he took the position that the lease was in effect until the exact and proper payment had been made and the quitclaim deed had been delivered.

Reviewing what transpired after receipt of the letter from defendants' counsel, of April 16, 1957, it is apparent that defendants either deliberately refrained from indicating that they would require a quitclaim deed in order to permit the time to go by and additional payments to accrue under the lease and option as if it were still in effect, or, as the trial court found, they intentionally

waived their right to the deed and then subsequently sought to withdraw their waiver and attempt to collect a large sum as rental for the period that had expired in the meantime. To permit defendants to take advantage of their silence under such circumstances would be most inequitable. The plaintiff no longer had possession of the property. He received nothing of value whatever for the additional thousands of dollars the defendants are now trying to claim, nor did the defendants give up or lose anything of value. They could have worked their claims or sold or disposed of them in any manner they saw fit the moment they received plaintiff's first letter surrendering possession.

The evidence in the trial was undisputed to the effect that had plaintiff known or suspected that defendants were going to insist upon settlement in full of their claim and delivery of a quitclaim deed as conditions to terminating the lease and option, plaintiff would have promptly complied. In other words that plaintiff relied upon the silence of defendants is undisputed and is further reason for the application of the doctrine of estoppel.

There are numerous cases decided by the Supreme Court of Arizona, and other courts, applying the doctrine of estoppel under such circumstances.

As an example see:

Willard Helburn, Inc. v. Spiewak, 180 F. 2d 480;

Bettleheim v. Hagstrom Food Stores, Inc., 249 P. 2d 301 (Cal.);

Johnson v. Neel, 229 P. 2d 939 (Colo.);

Keylon v. Arnold, 209 S. W. 2d 459 (Ark.);

Bond v. Wiegardt, 219 P. 2d 196 (Wash.);

Green v. Gila Water Co., 36 Ariz. 303, 285 P. 263.

A statement contained in a recent case decided by the Supreme Court of Arizona, *Holmes v. Graves,* 83 Ariz. 174, 318 P. 2d 354, is particularly applicable to the fact situation in this case. There the court says:

> "Estoppel will be applied to prevent injustices, *Munger vs. Boardman,* 53 Ariz. 271, 88 P. (2d) 356, and to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced. 19 *Am. Jur.* 676, *Estoppel, Section* 62."

Certainly the defendant, on November 12, 1956, November 16, 1956, November 21, 1956 (the dates he discussed the matter with his attorney, talked to the plaintiff on the telephone, and had his attorney write a letter discussing the proper amount of the November 8 payment) acquiesced in the treatment of the lease and option as having been terminated on November 5, 1956. We sincerely believe that to allow him, after an additional $7,000.00 rental had accrued, to maintain a position inconsistent with the one in which he acquiesced would be unconscionable, and under the law of the State of Arizona he should be estopped to maintain such inconsistent position, and, therefore, the trial court's judgment grants the defendants all the relief to which they could be entitled.

We also believe that the court was in error in holding as a conclusion of law that the execution, acknowledgment and delivery to the defendants of a quitclaim deed was a condition precedent to the exercise by plaintiff of his option to terminate the contract. Courts are generally disinclined to construe stipulations in a contract as conditions precedent unless compelled to do so by language of the contract plainly expressed and where to do so would result in injustice.

See:

San Diego Construction Co. v. Mannix, 166 Pac. 325 (Cal.);

Kelp Ore Remedies Corp. v. Brooten, 277 Pac. 716 (Ore.);

Superior Portland Cement v. Pacific Coast Cement Co., 205 P. 2d 597 (Wash.).

When called upon to construe such a provision the California Supreme Court stated:

> "However, it is the general rule in contract interpretation that stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language; and particularly so where a forfeiture would be involved or inequitable consequences would result. * * * It is significant that there is no similar conditional wording here in the parties' 'submission agreement.' If the parties had intended that in the event the arbitration award was made at a time when wage board approval was required and that such approval should be a condition precedent to effectiveness, they could have expressly specified that *only* if so approved, would the award become effective; but not having used the word *only,* they reasonably could be assumed to have intended, as the trial court concluded, that the award would become effective if given such approval *or* on such approval becoming unnecessary."
>
> *Alpha Beta Food Markets v. Retail Clerks Union,* 291 P. 2d 433; certiorari denied 76 S. Ct. 545, 350 U. S. 996.

On this point the Tenth Circuit Court quoted Williston on Contracts as follows:

> "In determining such a question at the present time little stress would be laid on refinements; rather the court would endeavor to interpret the meaning of the words used according to general principles of interpretation. A special rule of construction was established by the early cases which still might have some weight in case of ambiguity. If the performance which is urged to be a condition was also the subject-matter of a promise by the party from whom the performance was due, so that even though the words were not treated as words of condition there is a remedy to secure the performance of the act, the construction will be favored that no condition is meant; while on the other hand, if there will be no remedy to secure the performance of the act in question, unless the words can take effect as words of condition, because the contract contains no promise to render the performance, the construction will be given that the words create a condition. 'Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. The reason of this disinclination is that such a construction prevents the court from dealing out justice to the parties according to the equities of the case'. Williston on Contracts, §671."
>
> *Southern Surety Co. v. MacMillan Co.,* 58 F. 2d 541; certiorari denied 58 S. Ct. 18, 287 U. S. 617, 77 L. Ed. 536.

Paragraph 3 of the lease and option [Tr. 119], expressly provides that plaintiff would be obligated to make

the November 8, payment regardless of the date of termination, and paragraph 13 of the lease and option [Tr. 125] expressly requires plaintiff to furnish to defendants a formal release *upon request*. Defendants, therefore, had a remedy in the event plaintiff failed to make such payment or to deliver a release or quitclaim deed. The court was not compelled by plainly expressed language to construe these undertakings as conditions precedent. Performance of each of these acts was also the subject matter of a promise by plaintiff so that defendants had a remedy to enforce each of them. Under such circumstances the court should have held that neither the payment of the first quarterly payment nor the delivery of a quitclaim deed was a condition precedent to the right of termination.

If the lease and option is so construed, the trial court's judgment grants the defendants all the relief to which they could be entitled.

Conclusion.

We think it clear that the judgment of the trial court should be affirmed because:

1. The trial court properly found that defendants had waived their right to insist upon payment of the first quarterly installment and delivery of a quitclaim deed as conditions precedent to termination.

2. Under the evidence the defendants were estopped to treat the performance of said acts as conditions precedent.

3. The requirement of performance of said acts under the lease and option should not be construed as conditions precedent.

Respectfully submitted,

BOYLE, BILBY, THOMPSON & SHOENHAIR,
Attorneys for Appellee.